Ref. No. 329

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,
Complainant,

v.

NEW PEKING, INCORPORATED,
d/b/a NEW PEKING RESTAURANT,
Respondent.

8 U.S.C. §1324a
PROCEEDING

OCAHO CASE
No. 90100301

DECISION AND ORDER

STATEMENT OF THE CASE

A Complaint Regarding Unlawful Employment was filed by the United States of America against Respondent New Peking, Inc. d/b/a New Peking Restaurant on October 4, 1990. The Complaint alleges Respondent has violated the Immigration Reform and Control Act of 1986 (IRCA) in three counts.

Count One of the Complaint asserts Respondent has violated IRCA by hiring two individuals in the United States after November 6, 1986 while knowing they were not authorized for [illegible] this country. Count Two alleges that, in the alterna[illegible] one's "knowing hire" charges, Respondent has viola[illegible] unlawfully continuing the employment of the two ind[illegible] Three alleges Respondent has failed to comply [illegible] requirements with respect to fifty-one of [illegible] employees.

In accordance with the partie[illegible] tribunal on March 4, 1991, and in[illegible] tations made by the parties in thei[illegible] that Complainant has withdrawn Co[illegible] entirety, in addition to withdr[illegible] violation allegations contained in[illegible] Respondent has moreover stipulated [illegible] one of the remaining liability all[illegible]

The parties have also stipulat[illegible] for the determination of the remai[illegible]

As a result of the aforementi[illegible] only two issues in this case. The

Respondent has violated IRCA's paperwork requirements in the case of a former employee named Yim Hon. The second issue involves the appropriate civil money penalty for the instant violations.

Complainant submitted its Brief on Remaining Charge and Fine Assessment on March 28, 1991. Respondent filed a Memorandum Brief in reply on April 1, 1991. Subsequently, on April 15, 1991, Complainant filed its Reply Brief in this matter. Immediately thereafter, Respondent filed a Reply Brief on April 16, 1991.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Remaining Liability Issue

At the present time, Count Three of the Complaint alleges a total of forty-two instances of paperwork violations on the part of the Respondent. Respondent has admitted to all but one of these allegations. The single remaining allegation contends Respondent has violated 8 U.S.C. §1324a(a)(1)(B) by failing to require Yim Hon, a former employee, to complete section one of the employment eligibility verification form (I-9 form) at the time of hire.

The parties agree that Respondent hired Yim Hon on February 21, 1989. Apparently, this individual worked only a single day for the Respondent. Both parties also agree Respondent has failed to prepare an I-9 form for this employee. However, they differ as to whether Respondent possessed a duty to complete an I-9 for this former employee.

Complainant argues that Respondent possessed a duty to ensure Mr. Hon had completed part one of his I-9 at the time of hire, even though he only worked a single day. Complainant cites 8 C.F.R. §274a.2(b)(1)(i)(A) (1989) as support for this argument. Complainant also made several other arguments with respect to Mr. Hon; however, those arguments do not address the present issue in any significant way.

Respondent disputes Complainant's aforementioned argument. In its April 1st Memorandum Brief, Respondent contends there exists an inconsistency between the requirement that employees must complete part one of the I-9 on the day of hire and the regulatory provision which allows employers three days within which to verify employees' work eligibility. The gist of this argument lies in the fact that part one of the I-9 form also requires an employee to attest, under penalty of perjury, that he or she has presented genuine work eligibility documents to the employer. Respondent argues that

since employers, under former version of the regulation,[1] have a three day "window" within which to physically examine the eligibility documents presented by its employees, this implies the corollary that employees similarly possess a three day "window" in which to present such documents. And, if employees are allowed three days to present such documentation, it follows they cannot be required to declare, under penalty of perjury, that they have presented genuine documents at the time of hire when they have not yet done so pursuant to valid Department of Justice regulations. Respondent thus argues that this state of affairs manifests a contradiction in the regulatory provisions. Respondent further argues that this apparent inconsistency in the regulations must be interpreted in its favor, and that Complainant has consequently failed to demonstrate IRCA liability in this case.

Despite Respondent's argument of regulatory inconsistency, I do not interpret the two relevant sections of the Code of Federal Regulations to be contradictory. The two relevant provisions are in fact complementary.

8 C.F.R. §274a.2(b)(a)(i) states: "An individual who is hired...for employment must: (A) Complete section 1 -- "Employee Information and Verification" on the Form I-9 at the time of hiring;" (emphasis added). The term "hire" has been further defined to mean "...the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. §274a.1(c) (1990). However, it is not obvious that the phrase "time of hiring" is intended to denote the exact moment when an employee commences employment. Instead, I interpret the phrase to imply a period of time, rather than a specific point in time. I further read this implicit period as a reference to the three-day "window" in which employers are allowed to complete section two of its employees' I-9s.

The above interpretation is supported by 8 C.F.R. §274a.2 (b)(1)(i)(B), the regulatory subsection which immediately follows the regulation under consideration. §274a.2(b)(1)(i)(B) requires employees to present documentation to employers which will "...establish his or her identity and employment eligibility within the time limits set forth in paragraphs (b)(1)(ii) through (v) of

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[1] Former 8 C.F.R. §274a.2(b)(1)(ii) allowed employers three days after the date of hiring an employee to complete part two of that employee's I-9 form. However, this regulation was amended in 1990 to provide for completion of both parts of the form at the time of hire where an employee is to be hired for less than three days. It is unclear whether this amendment addresses the instant situation, since Respondent may not have intended to hire Yim Hon for less than three days. In any case, this amendment is not applicable here since it does not apply retroactively to pre-amendment violations.

this section" (emphasis added) 8 C.F.R. §274a.2(b)(1)(i)(B) (1990). In this subsection, there exists an express reference to the three-day "window" provided to employers to complete part two of form I-9.

Although §274a.2(b)(1)(i)(A) does not specifically make any reference to the three-day period, I find it must be read together with §274a.2(b)(1)(i)(B), which does contain such a reference. This is because both these subsections have a single objective: i.e. defining employees' obligations in the employment verification process. They are parts of the same regulatory scheme. If the compliance periods for these two subsections are interpreted in the manner which Complainant argues for in this case, they would make contradictory demands on employers and employees, as Respondent has pointed out in its Briefs. Thus, in order to reconcile these subsections and to perpetuate the regulatory scheme, I now interpret 8 C.F.R. §274a.2(b)(1)(i)(A) to include a three day period during which employees' may comply with the demands made upon them by section one of the I-9 form. Cf. Brooks v. Donovan, 699 F.2d 1010, 1011 (9th Cir. 1983) (courts look beyond express language of statute where literal interpretation would thwart the purpose of statutory scheme or lead to an absurd result).

In view of the above regulatory interpretation, it is clear that Complainant has failed to adequately allege Respondent's IRCA liability in this instance. Complainant alleges Respondent has violated IRCA because it failed to ensure that Yim Hon completed part one of his I-9 on the day he was hired by Respondent. But, in accordance with previous discussions, an employee's failure to complete part one of his I-9 during the first day for employment does not constitute an IRCA violation by the employer. Therefore, Complainant has failed to establish Respondent's IRCA liability with respect to the individual named Yim Hon.

From the above discussions, and from Respondent's stipulated admissions, I find Respondent New Peking, Inc. d/b/a New Peking Restaurant has violated 8 U.S.C. §1324a(a)(1)(A) by hiring two individuals in the United States after November 6, 1986 while knowing they were not eligible for such employment. The two iduals are:

Torres-Gonzalez
Jose Diaz-Bazan

nas violated IRCA's paperwork §1324a(a)(1)(B) with respect to

2. Juan Jose Diaz-Bazan
4. Olivan Estaban
6. Le John Long
8. Leung-Hoi Tai

9. Alex Torres
10. Kevin Yu
11. Terry L. Gasper
12. Vien Hoang
13. Nicholas Medrano
14. Jack Nguyen
15. Thomas Sun
16. Si Tran
17. Chan T. Wang
18. Rick Zheng Zhigiang
19. Barbara Miller
20. Rong Ji Wei
21. Pei-Ling Lee
22. Somsiri Paewattana-paisan
23. John Huang
24. Edmund Lo
25. Jasin Wang
26. Keh Chang
27. Amy Nave
28. James Pao
29. Yuan Shan Jiang
30. Weifan Weng
31. Dianjun Wu
32. Wen-Chieh Cheng
33. Yu Chu Hsiao
34. Thinh T. Phan
35. Beng Keong Teoh
36. Yung-Yuan Mu
37. Chunsha Liu
38. Corina Moreno
39. Peter Liu
40. Tina Der
41. Chun S. Wan

PENALTY DETERMINATION

Paperwork Violations

Respondent has admitted it violated the paperwork requirements contained at 8 U.S.C. §1324a(b) with respect to forty-one of its employees. Where violations of IRCA's paperwork requirements have been found, a civil money penalty between the amounts of One Hundred Dollars and One Thousand Dollars must be imposed upon the offending employer for each instance of violation. See 8 U.S.C. §1324a(e)(5). Administrative Law Judges (ALJs) may set the actual penalty anywhere within the allowed range; however, they do not have unfettered discretion in the penalty determination process. Instead, ALJs may set the appropriate penalty only after they have thoroughly considered five statutorily-mandated penalty factors. The five factors are: 1) the size of the employer; 2) the employer's good faith; 3) the seriousness of the violations; 4) whether the violations involves the actual employment of unauthorized aliens; and 5) whether the employer has a history of previous violations. See 8 U.S.C. §1324a(e)(3).

In this case, Complainant seeks a penalty of Three Hundred and Fifty Dollars for sixteen instances where Respondent failed to prepare I-9 forms. Complainant seeks Five Hundred Dollars for an additional two instances of failure to prepare I-9s by the Respondent (these two violations involve the actual employment of unauthorized aliens). In sixteen instances where Respondent failed to timely complete I-9 forms, Complainant is seeking a penalty of Two Hundred and Fifty Dollars for each of those cases. Three Hundred Dollars fines are proposed by Complainant for Respondent's failure to 'complete and sign' two I-9 forms. Finally, Complainant seeks the minimum penalty (One Hundred Dollars) for another four

paperwork violations on the part of the Respondent.

With the exception of the four instances where Complainant only seeks the minimum fine, I shall examine the proposed penalties in accordance with the five statutory factors enumerated above.

Size of Employer

Complainant characterizes Respondent as a substantial business, which has experienced substantial growth in sales and profits since its formation in 1987. Complainant further contends that it has taken into account Respondent's size by assessing the current fines in the 'lower half of the fine range'.

The parties have stipulated to certain financial figures regarding Respondent's revenues during the period between 1987 and 1989. The stipulations disclose that Respondent experienced financial losses in 1987 and 1988 while it gained a profit of $76,518.00 in 1989; it also appears that Respondent's annual sales figures never exceeded $800,000.00 during this period. The parties further stipulated that Respondent employs approximately twelve to thirteen employees at any one time, and that, since 1987, Respondent has employed a total of about eighty individuals. I find these stipulations indicate Respondent to be a relatively small business.

Since the purpose for the existence of IRCA civil penalties is to secure employers' compliance with the statute, and not to damage the economic viability of such employers, Respondent's profit and loss is a significant factor in assessing the appropriate penalty. Here, evidence indicates Respondent to be a relatively small business. Therefore, this serves as a factor which mitigates the penalty amount.

Employer's Good Faith

While good faith is not defined by IRCA, various factors have
n considered by other ALJs in ascertaining the existence of good
-h Among the factors considered are: the employer's efforts
-rate with the INS during the investigation process, and
he employer in complying with the
, such as employer's intent may

dent has attempted to cooperate
t Respondent's prior business
y compliance with IRCA. It is
occurred despite Respondent's
he whole, I find Respondent has
faith as well as bad faith
e,. I find this factor neither
ent penalties.

Seriousness of the Violations

The seriousness of the violations depend in large measure upon whether they render ineffective the congressional prohibition against the employment of unauthorized aliens. Therefore, the crucial inquiry for each of the current violations is whether the relevant paperwork defect could have contributed to the employment of an unauthorized alien.

There are basically four types of violations in this case: failure to prepare I-9s, failure to timely complete I-9 forms, failure to complete and sign I-9 forms, and failure to record the expiration dates of the employees' eligibility documents. All these types of practice tend to increase the likelihood of unauthorized aliens being employed in the United States, though in varying degrees. Such violations tend to render ineffective the purpose for which Congress first adopted IRCA's paperwork requirements. Hence, they are serious violations that serve to aggravate the penalty.

Actual Employment of Unauthorized Aliens

Only two of the forty-one paperwork violations under consideration here involve the actual employment of unauthorized aliens. Therefore, I find this factor aggravates the penalty only with respect to those two instances of violation.

However, this factor serves to mitigate the other thirty-nine paperwork violations. This is due to the fact that the number of unauthorized aliens actually hired by Respondent is very small in comparison the total number of individuals employed by it during the relevant period.

History of Previous Violations

There is no evidence which suggest
violated IRCA. Therefore, this is a mit

In consideration of the above factors
Dollars penalties which are assessed for two failures to prepare I-9s that resulted in the employment of unauthorized aliens to be appropriate assessments. I further find that as to the sixteen remaining instances where no I-9s were completed by Respondent, the penalties shall be reduced from Three Hundred and Fifty Dollars to Two Hundred Dollars per violation. In the case of the sixteen employees whose I-9s were untimely completed by Respondent, the penalties shall be reduced to One Hundred and Fifty Dollars per violation. In the two cases where Respondent failed to record the expiration dates of the employees' eligibility documents, Complainant's proposed penalties of One Hundred and Fifty Dollars are appropriate. The penalties for Respondent's failure to complete and sign two I-9s shall be reduced from Three Hundred

Dollars to Two Hundred Dollars per violation. Finally, in the three instances where Complainant seeks the minimum penalties, I find the assessment to be reasonable. Therefore, the total civil money penalty for Respondent's instant paperwork violations is set at Seven Thousand and Six Hundred Dollars ($7,600.00).

The Knowing Hire Violations

Unlike the case for paperwork violations, IRCA has not provided any specific guidance for the determination of the appropriate penalty amount for violations of the "knowing hire" provision. However, IRCA has mandated that the proper penalty for first-time "knowing hire" violations may range anywhere between Two Hundred and Fifty Dollars ($250.00) and Two Thousand Dollars ($2,000.00) per violation. See 8 U.S.C. §1324a(e)(4)(A)(i) (1990). In the present case, Complainant is seeking penalties of One Thousand One Hundred and Twenty Five Dollars ($1,125.00) for each of the two "knowing hire" violations committed by Respondent.

I determine the appropriate penalties herein in light of the entire record. In its Briefs, Complainant argues that its proposed assessments are appropriate because it is necessary to deter illegal employment through the "shadow economy" (no documents were ever completed for the two unauthorized aliens; they were paid in cash and no taxes were withheld from their paychecks). Complainant further emphasizes one of the alien's testimony, which was to the effect that an "older chinese lady", who presumably worked for Respondent, told him to "run out the back door" during an INS visit. In addition, Complainant refers to the fact that Respondent provided free housing for the aliens as evidence that Respondent actively sought to employ illegal aliens.

Respondent, on the other hand, claims that free housing were provided mainly for visiting chinese chefs, and that it sometimes offers such housing to other employees as a fringe benefit. Respondent also cited the sworn statement of one of the unauthorized aliens to show to that there is no evidence that an "older chinese lady" is associated with Respondent.

I find that Respondent's latter arguments are persuasive. The "free housing" and the "older chinese lady" claims are weak evidence with regard to the seriousness of Respondent's instant violations. However, I find that Respondent's payment practices with respect to these two unauthorized aliens do tend to aggravate the appropriate penalty. Such practices greatly increase the likelihood of illegal employment.

In mitigation, I note that most of Respondent's employees appear to have been eligible for employment in the United States. I am also taking into account Respondent's size in relation to the penalties already assessed for Respondent's paperwork violations. In addition, I note Respondent has already been fined for these

same two employees in relation to paperwork violations (the two employees' unauthorized status served as factors which aggravated the amount of those paperwork penalties).

In view of the aforementioned factors, I shall reduce the appropriate civil money penalties for the two "knowing hire" violations from One Thousand One Hundred and Twenty Five Dollars ($1,125.00) to Four Hundred and Fifty Dollars ($450.00) per violation for a total of Nine Hundred Dollars ($900.00).

The total penalty in this case therefore shall be Eight Thousand Five Hundred Dollars ($8,500.00). Seven Thousand and Six Hundred Dollars ($7,600.00) for the paperwork violations and Nine Hundred Dollars ($900.00) for the two "knowing hire" violations.

ORDER

IT IS HEREBY ORDERED that Respondent New Peking, Inc. d/b/a New Peking Restaurant pay a civil money penalty in the amount of Eight Thousand Five Hundred Dollars ($8,500.00) for forty-one violations of IRCA's employment eligibility verification provisions and two violations of IRCA's prohibition against the knowing hire of unauthorized aliens in the United States.

IT IS FURTHER ORDERED that the hearing previously postponed indefinitely be, and hereby is, canceled.

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FREDERICK
Administr

San Francisco, California
Dated: May 21, 1991

Ref. No. 329

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. 1324a Proceeding
vs.	)	
	)	Case No. 90100301
New Peking, Incorporated, d/b/a New Peking Restaurant, Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER
OF THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND ORDER

I. SYNOPSIS OF PROCEEDING

On October 4, 1990, a complaint was filed by the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter complainant), against New Peking, Inc. (hereinafter respondent). The complaint was filed with the Office of the Chief Administrative Hearing Officer (hereinafter OCAHO), which in turn served the complaint and a notice of hearing on the parties and assigned the matter to the Honorable Frederick C. Herzog, Administrative Law Judge (hereinafter ALJ).

The complaint alleged in three counts that the respondent violated the Immigration Reform and Control Act of 1986
One charged that the respondent hired
6, 1986, knowing they were
the United States (hereinafter
violation of 8 U.S.C.
ged alternatively that the
to employ the two individuals, in
2). Count Three charged that the
the employment eligibility
A (hereinafter paperwork
ty-one individuals, in violation

sequent briefs filed with the ALJ,
vo's allegations and nine of the
Count Three. Additionally, the
the remaining allegations,

except for one of the paperwork violations. This remaining allegation charged that the respondent violated 8 U.S.C. §1324a(a)(1)(B) by failing to require the named employee to complete section 1 of the Employment Eligibility Verification Form (hereinafter Form I-9) at the time of hire. Evidently, the employee in question worked only one day for the respondent.[1] ALJ's Decision and Order at 2. The respondent admitted that no Form I-9 had been completed on the employee but argued that completion of the Form I-9 was not required under the applicable statute and regulations as applied to the facts and circumstances of this case. *Id.* at 2-3.

The parties agreed to waive a hearing and, following the presentation of briefs as to the remaining issue, the ALJ issued a final decision and order, dated May 21, 1991. In the final decision and order, the ALJ held that the complainant failed to establish respondent's liability with respect to the paperwork violation.

Pursuant to 28 C.F.R. §68.51(a), the complainant timely filed, on May 31, 1991, a request for administrative review with this office, together with a supporting memorandum entitled, "Memorandum of Supporting Arguments Regarding Request for Administrative Review by the Chief Administrative Hearing Officer."

II. THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

In the decision and order, the ALJ ordered that the respondent pay a civil money penalty of $8,500.00 for t violations and the forty-one remaining paperw at 9. As to the paperwork charge still at is that the complainant, which argued that th required to ensure that the employee comp

[1] If the employer had intended t of less than three days, the empl §274a.2(b)(1)(iii) as it existed violation, would have been under sections 1 and 2 of the Form I-9 the employee's first working day. regulations is not applicable her or evidence that the named indivi for less than three days. "Compl Disputed Charge and Fine Assessme prior to issuance of the decision 274a.2(b)(1)(iii) has since been employer must ensure completion o hire.

Form I-9 even though he was only employed for a single day, failed to establish respondent's liability with respect to this individual. *Id.* at 4. The ALJ initially noted that complainant's regulations implementing IRCA, at 8 C.F.R. §274a.2(b)(a)(i)(A), require the employee to complete section 1 of the Form I-9 "at the time of hiring." *Id.* at 3. The ALJ noted that the term "hire" has been defined in the regulations at 8 C.F.R. §274a.1(c) as the actual commencement of employment. *Id.* at 3. The ALJ determined that the phrase "time of hiring" is not intended to denote the exact moment when an employee begins employment. *Id.* at 3.

The ALJ interpreted 8 C.F.R. §274a.2(b)(1)(i)(A) as including a three day period in which employees may complete section 1 of the Form I-9. *Id.* at 4. The ALJ noted that although the section does not make specific reference to the three day period, section 274a.2(b)(1)(i)(A) must be read together with section 274a.2(b)(1)(i)(B), which allows an employer three days in which to complete the employment eligibility verification information in section 2 of the Form I-9, to infer a "three day window" for completion by the employee of section 1 of the Form I-9. *Id.* at 4. The ALJ explained that to interpret the regulations as the complainant contends would make contradictory demands on employers and employees. *Id.* at 4. The ALJ concluded that since an employee's failure to complete section 1 on the first day of hire does not constitute an IRCA violation, the complainant failed to establish respondent's liability with respect to the employee in question. *Id.* at 4.

III. CONTENTIONS OF THE PARTIES

Complainant asserts that the issue in these proceedings is whether an employer is "in violation of the verification requirements of [8 U.S.C. §1324a] if the employer fails to require an employee to complete section 1 of the Form I-9 at the time the employee is hired[.]" Complainant's Memorandum of Supporting Arguments Regarding Request for Administrative Review By The Chief Administrative Hearing Officer (hereinafter Complainant's Memorandum) at 3.

Complainant first relies on 8 C.F.R. §274a.2(b)(1)(i)(A), which states that an employer must ensure that an employee properly completes section 1 of the Form I-9 at the time of hire. Complainant asserts that since no portion of the I-9 was ever completed for the employee, section 1 was not completed at the time of actual commencement of employment, and respondent therefore did not meet the requirements of the regulations. *Id.* at 4. Furthermore, the complainant argues that different time standards were intended for 8 C.F.R. §274a.2(b)(1)(i)(A) and (B). Subsection (A) sets out the "time of hiring" standard, while subsection (B) refers to entirely different time periods, including the three day time limit. *Id.* at 8.

The respondent asserts that the regulations are inconsistent with the Form I-9, because although section 1 is ostensibly the portion of the Form I-9 in which the employee makes an attestation as to citizenship or immigration status, section 1 also contains a statement whereby the employee attests to the validity of documents presented at the time of hire. Respondent's Memorandum Brief at 3.[2] The respondent argues that the regulations, to the extent that they require section 1 be completed at the time of hire, are inconsistent with the Form I-9. *Id.* at 3. The complainant in turn contends that respondent's above argument attempts to raise the language of the Form I-9 to the level of a regulation. Complainant's Memorandum at 5.

The complainant also contends that the respondent's argument that the Form I-9 can supersede a regulation is "some sort of an estoppel argument to avoid enforcement 'at the time of hire.'" *Id.* at 5. Complainant argues that the respondent offered no evidence to establish it was misled by the Form I-9. *Id.* at 5, 6. The complainant states that if the ALJ is going to hold that the complainant is estopped from enforcing a provision of the regulations, there must be some evidence that there was detrimental reliance by the respondent. *Id.* at 6. Complainant also contends that the language of the Form I-9 cannot constitute "affirmative misconduct," which is required to assert an estoppel claim against the government. *Id.* at 6.

Moreover, the complainant contends that although the regulations place different time constraints on the employer and employee, they do not impose contradictory obligations. *Id.* at 7. The complainant offers two arguments for the different time limits. First, the complainant argues that there is no reason to allow a three day delay in requiring an employee to make an attestation as to citizenship or immigration status. *Id.* at 7. The complainant contends that the benefit in requiring the attestation at the moment of employment is that unauthorized aliens may be deterred from accepting employment if they know they will have to make a perjurious claim about their immigration status before they begin work. *Id.* at 7. Second, the complainant states that the three day period also gives the employee a reasonable amount of time to locate and present documents to the employer, without preventing the employee from working in the meantime until the documents are located. *Id.* at 7-8.

Finally, the complainant argues that if the regulations had intended to grant the employee three days to complete section 1, this time frame could have been simply stated. *Id.* at 8.

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[2] This memorandum was filed with the ALJ prior to the issuance of the decision and order.

IV. REVIEW AUTHORITY OF OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Administrative review of an ALJ's decision and order is provided for at 8 U.S.C. §1324a(e)(7) and 28 C.F.R. §68.51(a). Section 68.51(a) of 28 C.F.R. provides in pertinent part that:

> . . . [W]ithin thirty (30) days from the date of the decision, the Chief Administrative Hearing Officer shall issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.
>
> (1) The order of the Chief Administrative Hearing Officer shall become the final order of the Attorney General.

The scope of administrative review by the Chief Administrative Hearing Officer (hereinafter CAHO) when reviewing ALJ decisions and orders is set forth in the Administrative Procedure Act. With regard to administrative appeals, the Administrative Procedure Act indicates that "the agency has all the powers which it would have in making the initial decision." 5 U.S.C. §557(b). In addition, the U.S. Court of Appeals for the Ninth Circuit, in Mester Manufacturing Co. v. INS, 879 F.2d 561, 565 (9th Cir. 1989), held that the CAHO properly applied a de novo standard of review to the ALJ's decision. Equally important, the Ninth Circuit in Maka v. INS, 904 F.2d 1351, 1355 (9th Cir. 1990) followed the reasoning in Mester by affirming the CAHO's authority to apply the de novo standard of review.

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a(a)(1), it is unlawful for a idual without complying with t eligibility verification tory section places the see that the individuals they

as expanded upon by the ing at 8 C.F.R. §274a, which ired or is recruited or section 1 of the Form I-9 "at a.2(b)(1)(i)(A). Section ions additionally provides ee business days of the hire,

physically examine the documentation presented by the individual and complete section 2 of the Form I-9. As previously stated, the term "hire," as it is used in the regulations, is defined as "the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. §274a.1(c).

The ALJ interpreted these provisions to imply that an employer is responsible for the employee completing section 1 of the Form I-9, not at the exact moment of hire, but rather within the three day period as expressed at subsection 274a.2(b)(1)(ii). ALJ's Decision and Order at 3-4. The ALJ stated that the provisions of the regulations enunciated above, when read with the adjacent provisions, provide the employer with a three day window in which to ensure that the employee has completed section 1 of the Form I-9. *Id.* at 4.

The ALJ's interpretation is not unreasonable, but it does not appear to be what the complainant had intended the subsection to mean. The complainant did not wish that the employer be given three days in which to ensure the employee completed section 1. Complainant's Memorandum at 2-3. The complainant's contentions in the record and in the brief filed in support of its request for review clearly establish the purpose of the regulatory provisions at issue, i.e., that the employee be required to make a statement about his or her citizenship or immigration status, regardless of whether documentation is presented.

As previously noted, the complainant proffers several reasons why it is appropriate for its regulations to plac- [illegible] different time limitations on the employer [illegible] of the two sections of the Form I-9. Cle[illegible] regulation was to impose a different time completion of section 1. While it is u[illegible] complainant had intended in using the [illegible] hire," it is clear the complainant int[illegible] limitation for section 1 be different period for completion of section 2.

However, even though these arguments on the part of the complainant have some validity, it must be kept in mind that employers did not have the benefit of complainant's interpretations at the time that the alleged violation took place. At that time, the complainant had published regulations, which included the aforementioned references to completing sections 1 and 2. The time limitation of three days for completion of section 2 was clear and concise. In contrast, the time period dealing with section 1 was ambiguous, leaving it up to the employer to interpret the meaning as intended by the complainant. By using the term "at the time of hiring," the complainant left the provision open to different interpretations. If the complainant wanted section 1 of the

Form I-9 completed at the exact moment of hire, it could have simply and specifically stated in the regulations that this section must be completed prior to the commencement of employment.

b. The Form I-9

To assist employers in complying with IRCA, the complainant's regulations referred employers to the Form I-9, designated by the complainant as the form to be used in complying with the requirements of the employment verification system. 8 C.F.R. §274a.2(a). However, the Form I-9 was not much assistance to the employer in clarifying the situation, as it did not inform the employer when the form needed to be completed. The Form I-9 only states, regarding the time for completion of the form, that "[a]ll employees, upon being hired, must complete section 1 of this form." Section 1 Instructions, Form I-9.

Additionally, there is an apparent inconsistency in section 1 of the Form I-9. In some circumstances, section 1 could not properly be completed at the moment of hire. For instance, if an employee, upon being hired, states that he or she will provide the employer, on the following day, with the necessary documents to prove employment eligibility, then the employee could not sign section 1 because that signature would be attesting to the fact that the employee had already presented to the employer documents which evidence his or her identity and eligibility for employment. In other words, since the employee had yet to furnish the documentation, he or she could not sign and complete the attestation for section 1. Therefore, in this situation, section 1 could not be completed at what the complainant would consider to be the "time of hire."

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c. The Handbook for Employers

To benefit employers and to explain employers' obligations under IRCA, the complainant also published a "Handbook for Employers." This handbook refers to the Form I-9 throughout and states that for persons hired after May 31, 1987, an employer "must complete a Form I-9 within three business days of the date of the hire." Handbook for Employers at 2. The handbook does not state that employees must complete section 1 at the moment of hire or even mention that different time limitations exist for the two sections. As with the discrepancy in the Form I-9, this information would tend to make an employer believe that he had three days to complete both sections 1 and 2 of the Form I-9.

VI. CONCLUSION

The ALJ's interpretation that the complainant's regulation implies a three day window for completion of section 1 of the Form I-9 is evidently not the interpretation which the complainant intended when the regulations were drafted. The complainant has stated several legitimate reasons why the employer should be held responsible for the employee completing section 1 at or before the time the employee is hired.

The complainant's interpretation of a somewhat opaque provision in its regulations could be considered appropriate, given the proper surrounding circumstances. However, the proper circumstances do not exist. The complainant's less than crystal clear regulations, taken in conjunction with the information (Form I-9 and handbook) published in connection with the regulations, could certainly mislead an employer int- interpreting the regulations as allowing three da· completion of both sections 1 and 2 of the Form I

Also, while not attempting to raise the la contained in the Form I-9 to that of a regulatory must be pointed out that the obvious inconsistenc Form I-9 (a document which was published in the F Register and disseminated through the Handbook fc only adds to the confusion. Therefore, while the in question can be interpreted as requiring that must ensure the completion of section 1 of the Fc moment of hire, the employer in this case cannot where the regulations, the Form I-9, and the Hand Employers appear to conflict with the interpretat by the complainant.

Notwithstanding the ALJ's well-reasoned and logical interpretation of the regulations, the complainant's interpretation of its regulations is reasonable and does not place a substantial hardship or burden upon employers. Therefore, the complainant's interpretation of the regulations will govern.

However, the respondent cannot be held liable for the remaining paperwork violation because the complainant's interpretation, provided during the course of this litigation, was never presented to employers, either through clear regulatory language or supporting publications. In fact, at the time of the alleged violation, it was unclear what an employer's obligations were regarding section 1 of the Form I-9. Therefore, given this uncertainty at the time of the alleged violation as to employer responsibility respecting the time frame for completion of section 1, the complainant has not shown that the respondent is in violation of the employment eligibility verification system.

ACCORDINGLY,

The Chief Administrative Hearing Officer hereby MODIFIES the ALJ's decision and order by removing that portion of the order which interprets the complainant's regulations as giving employers three days to ensure completion of section 1 of the Form I-9. This MODIFICATION leaves intact the $8,500.00 civil money penalty imposed on the respondent and also leaves intact the decision that the respondent is not in violation of IRCA with respect to the remaining employment verification allegation.

Modified this 18th day of June, 1991.

Jack E. Perkins

Jack E. Perkins
Chief Administrative
Hearing Officer

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